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Nos. 08-289, 08-294

In The Supreme Court of the United States

THOMAS C. HORNE, SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF ARIZONA,

and

SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES AND PRESIDENT OF THE ARIZONA SENATE,

Petitioners,

v.

MIRIAM FLORES, INDIVIDUALLY AND AS PARENT OF MIRIAM FLORES, MINOR CHILD; ROSA RZESLAWSKI, INDIVIDUALLY AND AS PARENT OF MARIO RZESLAWSKI, MINOR CHILD; STATE OF ARIZONA; AND MEMBERS OF THE ARIZONA STATE BOARD OF EDUCATION IN THEIR OFFICIAL CAPACITIES,

Respondents.

On Writ Of *Certiorari* To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF CIVIL RIGHTS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

*Nina Perales
David G. Hinojosa
Mexican American Legal Defense And Educational Fund
110 Broadway St., Suite 300
San Antonio, TX 78205
(210) 224-5476

Roger L. Rice
Jane E. López
Multicultural Education, Training & Advocacy, (META Inc.)
240A Elm St., Suite 22
Somerville, MA 02144
(617) 628-2226

**Counsel of Record*

[Additional Counsel Listed On Inside Cover]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

CESAR A. PERALES
JOSE PEREZ
DIANA SEN
LATINOJUSTICE PRLDEF
99 Hudson Street, 14th Floor
New York, NY 10013
(212) 219-3360

JOHN T. AFFELDT
TARA KINI
PUBLIC ADVOCATES, INC.
131 Steuart Street, Suite 300
San Francisco, CA 94105
(415) 431-7430

DANIEL R. ALONSO
W. STEWART WALLACE
MICHAEL DENVIR
KAYE SCHOLER LLP
425 Park Avenue
New York, NY 10022
(212) 836-8000

Attorneys for Amici

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STATEMENT OF INTEREST[1]

Amici are various civil rights organizations and public interest centers whose efforts include litigation, public policy and general advocacy to protect the civil rights of persons to equal educational opportunities. The *amici* include the Mexican American Legal Defense and Educational Fund (MALDEF), the Multicultural Education, Training & Advocacy, (META) Inc., LatinoJustice PRLDEF (formerly known as the Puerto Rican Legal Defense and Education Fund), Public Advocates, the Earl Warren Institute on Race, Ethnicity & Diversity and the Education Law Center. Each *amicus* has experience in securing the rights of English Language Learner ("ELL") students to access appropriate language programs and has a substantial interest in the outcome of this case. The individual statements of interest of all *amici* appear in the Appendix.

[1] Respondent Flores filed a letter consenting to the filing of this brief with the Clerk of the Court. Respondent State of Arizona and Petitioners have signed letters consenting to the filing of this brief and those letters are being filed with the Clerk of the Court. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION

This is a school finance case involving how Arizona finances public education for ELL students. As the court of appeals summarized, "The particulars of Arizona's school funding system are therefore at the heart of this case."[2] In sum, the district court issued a series of orders requiring Arizona to conduct a study of the costs of educating ELL students and to fund programs rationally related to the costs required for those students. Arizona's most recent response to these orders is an enactment known as HB 2064, which the court of appeals has found to have two specific flaws.[3]

Amici file this brief focusing on Petitioners' far-reaching argument that Arizona's compliance with provisions of the Elementary and Secondary Education Act (the "No Child Left Behind Act" or "NCLB") satisfies their obligation to take "appropriate action" under the Equal Educational Opportunities Act ("EEOA"). Petitioners advance baseless arguments by

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[2] *Flores v. Arizona*, 516 F.3d 1140, 1147 (9th Cir. 2008). The detailed history of the litigation is found in the opinion of the court of appeals. *Id.* at 1140-1154.

[3] The court found that the "clearest violation of federal law" pertained to the state's violation of 20 U.S.C. § 7902 which provides that in determining a school district's eligibility for state aid, a state may not take into account federal funds. *Id.* at 1178. Petitioners did not address the 20 U.S.C. § 7902 issue in their briefs. The court of appeals also found that a two-year limitation on state ELL aid was irrational. *Amici* agree with the court on both counts.

misreading provisions of NCLB in a way that undercuts 30 years of federally-protected civil rights for millions of ELL school children across the country. As of the 2005-2006 school year, there were more than five million ELL students attending schools in the U.S., a 57.17% increase over the past decade.[4]

While Petitioners supposedly seek judicial non-interference with local control, the implications of their argument would plunge the federal courts into greatly expanded involvement in day-to-day educational policy decisions. *Amici* respectfully request that the Court refuse this intrusive invitation and affirm the decision of the courts below.

[4] National Clearinghouse for English Language Acquisition and Language Instruction Educational Programs, *The Growing Numbers of Limited English Proficient Students 1995/96-2005/06*, *available at* http://www.ncela.gwu.edu/policy/states/reports/statedata/2005LEP/GrowingLEP_0506.pdf. Spanish is the language of approximately 80% of these students. U.S. Dep't of Education Office of English Language Acquisition, Language Enhancement, and Academic Achievement for Limited English Proficient Students, *The Biennial Report to Congress on the Implementation of the Title III State Formula Grant Program, School Years 2004-06* (June 2008), *available at* http://www.ed.gov/about/offices/list/oela/title3biennial0406.pdf.

STATUTORY BACKGROUND

I. The Equal Educational Opportunities Act

The EEOA was born from President Nixon's address to the nation on March 16, 1972, in which he proposed a new law that "would further establish an educational bill of rights for [those] who start their education under language handicaps, to make certain that they, too, will have equal opportunity." President Nixon, Address to the Nation on Equal Educational Opportunities and School Busing, 1972 Pub. Papers 425 (Mar. 16, 1972).

President Nixon affirmed that this goal could only be achieved if ELL students are included in the learning process: "School authorities must take appropriate action to overcome whatever language barriers might exist, in order to enable all students to participate equally in educational programs." President Nixon, Special Message to Congress on Equal Educational Opportunities and School Busing, 118 Cong. Rec. 8931 (Mar. 17, 1972). He further clarified that the educational opportunity afforded to all schoolchildren must "not only [be] equal, but adequate." *Id*.

Days later, the EEOA was introduced in the U.S. House of Representatives and stated that "[n]o state shall deny equal educational opportunity to an individual on account of his race, color, or national origin, by . . . the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its

instructional programs." 118 Cong. Rec. 9012 (Mar. 20, 1972); H.R. 13915 § 201(f). Regarding the EEOA's explicit requirement that states eliminate language barriers for ELL students, the committee hearing the bill explained:

> [T]he committee bill for the first time in Federal Law contains an illustrative definition of a denial of equal educational opportunity. It is the purpose of that definition . . . to provide school and governmental authorities with a clear delineation of their responsibilities to their students and employees and to provide the students and employees with the means to achieve enforcement of their rights.

House Comm. on Educ. and Labor, H.R. Rep. No. 92-1335, at 3 (1972).

The Committee recognized that the statute, among other purposes, was designed to ensure that ELL students received equal educational opportunities. "As President Nixon has stated, these children will not have true equality of educational opportunity until these language . . . barriers are removed." *Id.* at 6. Speaking prior to this Court's decision in *Lau v. Nichols*, 414 U.S. 563 (1974), Rep. Veysey recognized that the EEOA:

> establishes for the first time an express requirement that schools take affirmative action to overcome language barriers that impede equal participation by students. This provision especially aids [those] whose language and cultural barriers have been ignored

> for far too long. Provisions like this are essential to achieving true equality of educational opportunity for all our citizens.

118 Cong. Rec. 28865 (Aug. 17, 1972).[5]

Congress ultimately enacted the EEOA as Title II to the Educational Amendments Act of 1974 (Pub. L. No. 93-380, title II, 88 Stat. 515 (1974)), shortly after this Court's decision in *Lau v. Nichols*, 414 U.S. 563 (1974). There, the Court stated:

> Basic English skills are at the very core of what these public schools teach. Imposition of a requirement that, before a child can effectively participate in the educational program, he must already have acquired those basic skills is to make a mockery of public education. We know that those who do not understand English are certain to find their classroom experiences wholly incomprehensible and in no way meaningful.

Id. at 569 (1974) (citing, *inter alia*, Office of Civil Rights regulations and policies requiring school districts to take affirmative steps to rectify English language deficiencies of their students so that they may participate effectively in public educational programs).

Congress also included an enforcement component, providing a private right of action for students to enforce their civil rights when states or school

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[5] The 1972 bill, as set forth in H.R. 13915, passed the House, but was ultimately defeated in the Senate.

districts fail to take "appropriate action" to remove existing "language barriers." 20 U.S.C. § 1706. Congress' inclusion of a private right of action to allow ELL students to bring suit to remove language barriers reflects Congress' recognition that the EEOA established for the courts, in President Nixon's words, a "new and broader base on which to decide future cases" involving educational civil rights. President Nixon, Special Message to Congress on Equal Educational Opportunities and School Busing, *supra*.

II. The No Child Left Behind Act

NCLB is an educational funding authorization statute that requires states that accept federal funds under the Elementary and Secondary Education Act ("ESEA") for public education to comply with certain accountability measures designed to improve "the academic achievement of all students." 20 U.S.C. § 6301(4). The major provisions addressing ELL academic achievement are Titles I and III, which contain an overlapping accountability framework for monitoring ELL educational progress in English Language Arts ("ELA") and math.

Title I requires that districts and schools, as a condition of receipt of Title I funds, make "Adequate Yearly Progress" ("AYP") for all students, including for various identified subgroups, such as ELLs. AYP is primarily determined by the percentage of students

overall, as well as in each subgroup, who score "proficient" on state ELA and math assessments. 20 U.S.C. § 6311(b)(2)(B)-(C).

Title III of NCLB, a statutory grant program known as the English Language Acquisition, Language Enhancement and Academic Achievement Act ("Title III"), is specifically designed to provide funds to "help ensure that children who are limited English proficient . . . attain English proficiency . . . and meet the same challenging State academic content and student achievement standards as all children are expected to meet." 20 U.S.C. § 6812(1). Title III grants aid to states upon receipt of plans approved by the federal government. *See id.* at §§ 6821-6826. Title III incorporates Title I AYP accountability for ELLs by requiring that Title III-funded districts meet AYP for ELLs, in addition to meeting objectives demonstrating ELL progress in learning English. 20 U.S.C. § 6842(a).[6]

The text of NCLB demonstrates that Title III was conceived to act as a gradual means to improve ELL achievement in English and mathematics. 20 U.S.C. §§ 6311(b)(2)-(3), 6842(a)(3). In contrast to the immediate, rights-based framework of the EEOA, NCLB's accountability measures that require adequate yearly progress for ELL children threaten only removal of

[6] However, the parental accountability and program improvement provisions of Title I do not apply to the progress in learning English provisions of Title III.

federal funding. Indeed, the statute merely authorizes and does not guarantee federal funding for these programs; its effectiveness is thus tied to available funds.

As a result, Title III specifically instructs that federal funds provided to states under NCLB shall be used only to "supplement" funds already earmarked by states for ELL programs; supplanting pre-existing public funds is prohibited. 20 U.S.C. § 6825(g). 20 U.S.C. § 6314(a)(2)(B) expressly states that:

> A school participating in a schoolwide program shall use funds available to carry out this section only to supplement the amount of funds that would, in the absence of funds under this part, be made available from non-Federal sources for the school, including funds needed to provide services that are required by law for children with . . . limited English proficiency.

Id. The statute goes on specifically to state that a "school that chooses to use funds from such other programs shall not be relieved of the requirements relating to . . . civil rights [and] uses of Federal funds to supplement, not supplant non-Federal funds. . . ." *Id.* § 6314(a)(3)(B). Violation of this requirement may lead to the loss of all federal funds. *Id*. § 1234(a)-(i). Likewise, the predecessor of Title III, the Bilingual Education Act, contained similar "supplement" not "supplant" funding requirements which persisted through five amendments over three decades, attesting to Congress' long-standing, consistent dedication

to ensuring that states honor their educational civil rights obligations to their students independently of Title III or its predecessor statute.[7]

NCLB expressly states that it does not amend or repeal any statutes other than the ESEA. 20 U.S.C. § 6301. Furthermore, the text of both Title III of NCLB and its predecessor show that they are meant to work in conjunction with other ELL programs administered by the Department of Education to maximize federal efforts aimed at serving ELL children.[8]

NCLB also has purely administrative mechanisms for remedying state and local deficiencies in meeting its standards. *See Newark Parents Ass'n v. Newark Pub. Sch.*, 547 F.3d 199, 209 n.5 (3d Cir. 2008). At the same time, it contains a savings clause: "Nothing in this part shall be construed in a manner

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[7] Under the Bilingual Education Act, federal funds were required to be allocated to supplement and, to the extent practicable, increase the level of state and local funds made available – but in no case supplant such funds. *See* Public Law 90-247 (Jan. 2, 1967), § 705(a)(4); Public Law 93-380 (August 21, 1974), § 721(b)(3)(A); Public Law 95-561 (Nov. 1, 1978), § 721 (b)(3)(G); Public Law 98-511 (Oct. 19, 1984), § 721(f)(4); Public Law 100-297 (Apr. 28, 1988), § 7032(e); Public Law 103-382 (1994), §§ 7116(h)(4), 7134(f).

[8] *See* 20 U.S.C. §§ 6823, 6913, 6914, 6951, 6965, 6983; Public Law 100-297, Sec. 7051 (Apr. 28, 1988). Coordination of Title VII education programs with other programs, including the Goals 2000: Educate America Act and other Acts to "secure the most flexible and efficient use of Federal funds" was also envisioned. *See id*. at § 7121.

inconsistent with any federal law guaranteeing a civil right." 20 U.S.C. § 6847.

SUMMARY OF ARGUMENT

Congress never intended for a state's compliance under NCLB to substitute for an obligation under the EEOA to take appropriate action to overcome language barriers. Petitioners fail to cite any legislative history of NCLB to indicate such congressional intent or any intent to eliminate ELL students' private right of action to sue states under the EEOA. On the contrary, Congress expressly noted its intent to preserve ELL students' private right of action by including a savings clause in NCLB for protection of civil rights under federal laws, such as the EEOA.

Furthermore, NCLB is not the all-encompassing, comprehensive statute suggested by Petitioners. NCLB is a statute whose authorization has lapsed and whose future is unknown. Nonetheless, Petitioners ask this Court to equate the EEOA to the current version of NCLB, which neither covers the entire instructional program nor requires "appropriate actions" such as trained English as a Second Language teachers or state monitoring of ELL programs. Under NCLB, nearly half the ELL students in Arizona and California are not counted for accountability purposes because they are in grades K-2 or 9, or found in subgroups of fewer than 40 (or, in California, 100) or attend high schools which do not receive

ESEA/NCLB funding. The use of various statistical devices allows schools and the State of Arizona to meet AYP under NCLB even though most of their ELL students are not proficient in reading or mathematics. For that subset of schools not receiving Title I federal funding and for Title III-funded districts generally, the parental accountability requirements of the NCLB do not apply.

Finally, Petitioners unnecessarily invite the federal courts to become embroiled in detailed oversight of what it means to comply with NCLB statute. Should the Court accept Petitioners' argument, federal judges will be tasked with the responsibility of determining whether varying degrees of NCLB "compliance" among the states meet the statutory requirements and Congressional intent of NCLB and whether states are taking appropriate action under the EEOA.

ARGUMENT

I. Congress Never Intended for NCLB to Preclude Civil Rights Actions Brought Under the EEOA

In drafting NCLB, Congress inserted a savings clause to preserve existing civil rights under other federal laws, including the right of ELL students to equal educational opportunities under the EEOA. *See* 20 U.S.C. § 6847. Nevertheless, Petitioners ask the

Court to conclude that Congress chose to allow states to comply with NCLB instead of requiring appropriate action under the EEOA without Congress saying so. Such an interpretation would erroneously lead to the repeal of the ELL individual's right of action under the EEOA against state defendants. Such repeals are disfavored. *See Morton v. Mancari*, 417 U.S. 535, 549 (1974). Indeed, this Court has stated repeatedly that the central question in deciding whether one statute precludes a cause of action in a preceding statute is whether Congress intended it to do so. *Fitzgerald v. Barnstable*, 129 S. Ct. 788, 793-94 (2009). Petitioners have failed to present any cogent argument or evidence demonstrating such congressional intent.

A. There is no Evidence of Congressional Intent in NCLB to Preclude EEOA Causes of Action

The crux of Petitioners' argument is that Congress enacted NCLB to fulfill the obligations of states to take "appropriate action" under the EEOA. However, Petitioners' argument contradicts basic canons of statutory interpretation because Petitioners cannot point to any evidence that Congress ever considered the EEOA's requirements when drafting and adopting the NCLB – with the lone exception, vitiating Petitioners' position, of Congress' inclusion of its savings clause in NCLB. In addition, the EEOA's private right of action has allowed the lower courts to develop standards for measuring "appropriate action" under

the EEOA congruent with its principal purpose of protecting the civil rights of ELL students to access equal educational opportunities and overcome language barriers. *See, e.g., Castaneda v. Pickard,* 648 F.2d 989, 1009 (5th Cir. 1981); *Gomez v. Illinois State Bd. of Education*, 811 F.2d 1030 (7th Cir. 1987). Despite this well-established precedent, there exists no evidence that Congress ever considered undoing these recognized and accepted judicial standards in enacting NCLB.

1. Congress Never Considered the Private Right of Action Under the EEOA

Petitioners do not argue that Congress ever debated the merits or the history of the EEOA's private right of action when enacting NCLB. Instead, Petitioners rely on the converse: that by never mentioning the EEOA or "appropriate action," Congress must have intended to allow states to satisfy their obligations under the EEOA by meeting the requirements outlined in NCLB. This argument turns statutory construction canons on their head and finds no support in the cases cited by Petitioners.

This Court has refused to draw inferences about Congress' intent to repeal preceding statutes when Congress fails even to mention the purported change in the legislative history of the successive statute. *See, e.g., American Hosp. Ass'n v. NLRB*, 499 U.S. 606, 613-14 (1991) ("If this amendment had been

intended to place the important limitation on the scope of the Board's rulemaking powers that petitioner suggests, we would expect to find some expression of that intent in the legislative history.") (citing *Harrison v. PPG Indus*., 446 U.S. 578, 602 (1980) ("In a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night.")) As in the cases cited above, Petitioners reference no legislative history of NCLB indicating Congress' intention to sweep away the EEOA's private right of action against states.

2. The Courts Have Developed a Working Definition of "Appropriate Action" That Fulfills the Purpose of the EEOA

Petitioners also wrongly assert that the Court should substitute the remedial scheme in NCLB for the obligations of states under the EEOA because the term "appropriate action" is ambiguous and therefore must be interpreted under the NCLB statute. NCLB and ESEA are not the same or even "successive" statutes amending the ESEA.[9] In fact, the ESEA

[9] The EEOA is Title II to the Education Amendments of 1974 but it did not amend the Elementary and Secondary Education Act of 1965. Title I of the ESEA is specifically named "Amendments to the Elementary and Secondary Education Act

(Continued on following page)

existed both before and after the EEOA, the statutes were codified under different chapters, and both have existed harmoniously for 35 years. Furthermore, Petitioners' interpretation defeats Congress' purpose for the EEOA, which is to require states and education agencies to take "appropriate action" in addressing the needs of ELL students and to provide an avenue for judicial redress. As this Court has stated, courts must interpret statutes in a manner that fulfills the intent of Congress. *Fitzgerald*, 129 S. Ct. at 788. The lower courts have assumed this task and developed a working definition of "appropriate action."

In *Castaneda v. Pickard*, the Fifth Circuit developed a three-prong test in order to decide whether an education agency has taken "appropriate action" under the EEOA. 648 F.2d 989, 1009 (5th Cir. 1981). The Fifth Circuit required: that ELL programs be based on sound pedagogical theory; that the theory be supported with the appropriate practices, personnel and resources; and that the programs be successful in actually helping students to overcome their language barriers. *Id.* at 1009-1010. This test has been adopted consistently by appellate courts across the country. *See, e.g., Gomez*, 811 F.2d 1030; *Idaho Migrant Council v. Bd. of Education*, 647 F.2d 69 (9th Cir. 1981).

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of 1965." Thus, the EEOA is not an amendment to ESEA but falls under the "other purposes" language of the Act's stated purpose. Pub. L. No. 93-380, 88 Stat. 515 (1974).

This existing body of law defining "appropriate action" never once caused Congress to consider amending NCLB to address the courts' interpretation of "appropriate action." This further evidences Congress' intent to have the EEOA and NCLB co-exist and the remedy under the EEOA to be unaffected. *See Fitzgerald*, 129 S. Ct. at 797 (in failing to find congressional intent in Title IX to repeal § 1983 claims, the Court emphasized the importance of the state of the law interpreting § 1983 claims when Title IX was enacted).

B. NCLB and the EEOA Work in Harmony

Because the EEOA and NCLB operate in tandem to meet the needs of ELL students, there is no basis on which to conclude that the latter statute supplants the obligations of the former. *See United States v. Estate of Romani*, 523 U.S. 517 (1998) ("we think the proper inquiry is how best to harmonize the impact of the two statutes"). Although two statutes may have the same overall goal, their different roles in achieving that goal remain relevant in determining whether one statute overrides another. *See Erlenbaugh v. United States*, 409 U.S. 239 (1972) (finding that an exception under one anti-gambling statute did not apply to another anti-gambling statute because the two laws served different roles although both were aimed at stopping organized crime).

The EEOA and NCLB share part of the same goal in enabling ELL students to become proficient in

English, and although their functions are different, they complement one another rather than conflict. As stated above, the EEOA is a federal civil rights statute that allows individual ELL students to sue when their state has denied them equal educational opportunities. *See* Statutory Background, *supra*. Conversely, NCLB is a federal funding statute that potentially allows the federal government to withhold funds from voluntarily participating states when they fail to adhere to specific program requirements. *See id*. However, these differences show that the statutes are complementary rather than in conflict.[10]

C. Congress Never Intended to Repeal or Otherwise Preclude Actions Under the EEOA for Individuals Against States

Petitioners attempt to side-step this Court's unwillingness to repeal congressional statutes by judicial fiat, stating that they do not seek a repeal of

[10] This is further evidenced by the supplement-not-supplant provision of Title III. The Department of Education has interpreted the supplement-not-supplant section as drawing a distinction between funds from NCLB and funds which the state must raise to comply with the EEOA. U.S. Dep't of Education, *Supplement Not Supplant Provision of Title III of the ESEA*, *available at* http://ed.gov/programs/sfgp/supplefinalattach1.doc ("This requirement is . . . based on the . . . [EEOA] . . . Therefore, the use [of] . . . Title III funds to provide core language instruction educational programs . . . would violate the supplement not supplant provision . . . as such services are required to be provided by States and districts regardless of the availability of Federal Title III funds.").

the EEOA, only that they should not be held to the EEOA's standard of "appropriate action" in light of NCLB's specific requirements pertaining to the education of ELL students.[11] However, Petitioners' citation to *United States v. Fausto,* 484 U.S. 439, 452 (1988), for their theory that "the implications of a statute may be altered by the implications of a later statute" is unavailing here. (*See* Superintendent's Br. at 60). Unlike the judicially-created implied action in *Fausto*, the EEOA has an express cause of action; consequently, there is no "judicial interpretation" to repeal.

In *Fausto*, the Court found that Congress created the Civil Service Reform Act "to replace the haphazard arrangements for administrative and judicial review of personnel action, part of the 'outdated patchwork of statutes and rules built up over almost a century.'" *Id.* at 444. The Court also noted the widespread abuse of the administrative and judicial review processes by civil service employees. *Id.* at 445. As a result, the Court found that although there was not an express repeal of the Back Pay Act by Congress in the CSRA, the Court repealed its own judicial interpretation of an implied claim under the

[11] Oddly enough, Petitioners further proffer that ELL students could maintain an action against a district or school (not the state) but never explain how Congress intended such varying results. Of course, if the problem is systemic and begins at the state level, such an interpretation would provide no meaningful protection of the civil rights of ELL children.

Back Pay Act for certain civil servants. *Id.* at 453. Here, the legislative history of NCLB provides no indication that its purpose was to address a haphazard arrangement or widespread abuse of administrative and judicial review processes under the EEOA nor was there an implied right of action created by the courts. As stated earlier, Congress made no mention of the EEOA.

The lone mention of the EEOA was indirectly through the NCLB's savings clause, which represented Congress' intent to *preserve* civil rights protections under the EEOA. Similar savings clauses in statutes have been recognized as evidence of Congress' intent to preserve actions in other statutes. *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 383 (1983) (holding that the savings clauses in the 1933 Securities Act and the 1934 Securities Exchange Act confirmed that the remedies in each Act were to be supplemented by "any and all" additional remedies); *see also Pennsylvania R.R. v. Sonman Coal Co.*, 242 U.S. 120, 123-124 (1916) (holding that, "a manifest purpose of [a savings clause] is to make it plain that such appropriate common law and statutory remedies as can be enforced consistently with the scheme and purpose of the act are not abrogated or replaced") (internal quotation omitted).

Adopting Petitioners' argument here could lead to countless similar preclusion defenses to other civil rights lawsuits filed to protect the rights of students to equal educational opportunities, including special education and minority students who are "covered"

under the NCLB. To the contrary, the Court has consistently found that civil rights statutes touching upon the same or similar subject can co-exist. *Fitzgerald*, 129 S. Ct. at 788 (unanimous opinion holding that Title IX does not preclude § 1983 actions alleging unconstitutional gender discrimination); *see also Herman & MacLean v. Huddleston*, 459 U.S. 375, 383 (1983).

II. Petitioners Overstate the Operation and Remedial Scheme of NCLB

Petitioners acknowledge that Section 1703(f) of the EEOA remains a viable, individual rights securing statute, although they maintain that the thrust of the statute does not reach to Arizona's school funding plans.[12] Nonetheless, they also argue that the application of Section 1703(f) rests on one question: Whether Arizona receives federal funding under the NCLB. That question grossly overstates the operation of NCLB itself. Although NCLB has a number of complex provisions and seeks to hold states accountable for the expenditure of federal funds, it is not the all-encompassing, comprehensive remedial scheme meant

[12] Petitioner Horne: "The Superintendent never claimed that NCLB negated the EEOA." Superintendent's Br. 59. Petitioner Speaker of the House: "Moreover, situations may well arise where, although a State is in compliance with NCLB's mandates, particular schools or school districts engage in individual instances of discrimination for which a court-ordered remedy under the EEOA is 'essential' to correct a 'particular denial [ ] of equal educational opportunity.' " Legislators' Br. 60.

to replace the EEOA as described by Petitioners. As indicated further below, NCLB's coverage is quite limited and inconsistent. Congress could not have intended that NCLB would repeal the ability to bring EEOA actions against states under a system where hundreds of thousands of ELL students nationally are simply not counted for NCLB's purposes.

A. NCLB is Subject to Re-authorization

As pointed out above, courts have sensibly interpreted Section 1703(f) for 35 years. During that time there have been numerous iterations of the ESEA, including the changes to the Act's provisions that pertain to ELL students. While some courts, including the court of appeals in the seminal *Castaneda* case, have consulted those provisions to determine the scope of Section 1703(f), no court has stated that it could not weigh evidence of whether language programs of any nature were being implemented by trained teachers with access to materials for ELL students under the monitoring authority of the state and local education agencies ("LEAs"). In now urging that judicial inquiry end with "NCLB compliance," Petitioners confront an initial dilemma. Congressional authorization for funding NCLB has expired.[13] How and whether the Act will be extended is

[13] The Act was funded for the Fiscal Year 2002 through Fiscal Year 2007. The funding was automatically extended through September 30, 2008, pursuant to 20 U.S.C. § 1226(a).

not known.[14] Yet Petitioners urge that § 1703(f) be conflated with NCLB even in the face of NCLB's uncertain future. This Court should summarily reject Petitioners' argument.

B. Petitioners Concede Various Aspects of "Appropriate Action" Under the EEOA Were Neither Required by NCLB Nor Approved by the USDOE

Petitioners implicitly acknowledge that the "appropriate action" requirement of Section 1703(f) requires states to do more than comply with NCLB. For example, Superintendent Horne states: "In this case, 'appropriate action' has been taken by improving ELL programming, hiring ELL qualified teachers, and reducing class sizes." (Superintendent's Br. 4). These examples of "appropriate action" taken by Arizona are not challenged by *amici*. Although they are not inconsistent with the goals of NCLB, it is

[14] The Court can take note that the future is, at least, unknown. One of the original authors of NCLB has noted: "In the five years since its passage, however, NCLB has produced both strong support and vociferous criticism . . . Some have even called for the act's repeal." Sen. Edward M. Kennedy, *Foreword*, Winter 2006 Issue, Harv. Educ. Rev. (2006), *available at* http://www.hepg.org/document/9/; Goldwater Institute, *Opting Out of No Child Left Behind* (2008); The Heritage Foundation, *Reforming No Child Left Behind by Allowing States to Opt Out: An A-Plus for Federalism* (2007); Arizona Republic, *An uncertain future for 'No Child Left Behind'* (2009), *available at* http://www.azcentral.com/arizonarepublic/local/articles/2009/01/25/20090125ednochild01.

instructive that these "appropriate actions" are not required by NCLB, which does not speak to monitoring, reducing class size or ELL teacher endorsements.[15]

C. In Contrast to the EEOA, NCLB Does not Address Equal Opportunity for All Parts of an Educational Program

Despite ambitious language about closing the academic achievement gap (*see* 20 U.S.C. § 6812(1)), NCLB only holds schools accountable for improving math and ELA. *See* 20 U.S.C. § 6311(b)(2)-(3).[16] By contrast, the EEOA mandates that states ensure that ELL students are provided with equal access to all "instructional programs" offered by an LEA (20 U.S.C. § 1703(f)), which by definition encompass

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[15] The Superintendent's statement that: "Many of these steps were approved by the federal government and none of them existed before 2000" should not be taken to infer that these actions by Arizona were required by NCLB. In fact, a close examination of the nine transcript citations that accompany the statement reveals that few are examples of the federal government approving Arizona's measures. Superintendent's Br. 18 referencing Tr. Day 1, pp. 36, 43, 45, 47, 50, 55, 65, 70, 158.

[16] The Act also requires testing in science beginning in 2007-08 (20 U.S.C. § 6311(b)(3)(C)(v)(II)), but states, districts, and schools are not held accountable for students' progress in science as no specific "Annual Measurable Objective[s]" need be set as with English and math. (20 U.S.C. § 6311(b)(1)(G); 34 C.F.R. § 200.20).

many subjects and programs beyond math and English.

NCLB's definition of "core academic subjects," while not exhaustive, illustrates the type of "instructional program" to which ELL students are entitled, defining "core academic subjects" as English, reading/language arts, math, science, foreign languages, civics and government, economics, arts, history, and geography. 20 U.S.C. § 7801(11); 34 C.F.R. § 200.55(c). Where an LEA offers these "core academic subjects" within its "instructional programs," under the EEOA, it must also provide ELL students with equal access to this academic content. *See Castaneda*, 648 F.2d at 1011 (§ 1703(f) requires schools to "design programs which are reasonably calculated to enable [LEP] students to attain parity of participation"). Under NCLB, with its focus on English and math, a state or LEA may meet its NCLB goals for ELL students under Title I (AYP) and Title III (Annual Measurable Achievement Objectives, "AMAOs") and yet provide ELL students little or no instruction in other subjects.

D. The Accountability Provisions of NCLB Exclude Thousands of ELL Students

Central to NCLB's accountability provisions is the concept of AYP as determined by assessments of students, including ELL students. *See* 20 U.S.C. § 6311. A school that fails to make AYP for two consecutive years is identified as needing "school improvement"

under 20 U.S.C. § 6316. Although parents of students in such schools are provided with the option of transferring their students to another school in the district (*id.* at § 6316(b)(1)(E)(i)) and may select supplemental educational services if an identified school continues to lag after one year (*id.* at § 6316(b)(5)), insofar as Title III of NCLB is concerned, those options are not available to parents of ELL students where annual progress in learning English is not occurring but only to parents at those schools that do not meet AYP.[17] Since NCLB does not incorporate a private right of action,[18] these limited parental options of transferring to another school or possibly receiving supplemental services become the only way that some but not all parents of ELL students can attempt to mitigate the harm to their children of unequal education.

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[17] The requirement that ELL students show progress toward learning English is different than that of the requirement to meet AYP in English/Language Arts. The first is measured by English language growth on a language proficiency test for ELL students. AYP in English is the requirement for meeting a state's proficiency standards in English/Language Arts that is required of all students, ELLs and non-ELLs alike. 20 U.S.C. §§ 6311(b)(2)(B), 6311(b)(7) & 6842(a)(3)(A). Additionally, not all approved supplemental service providers are required to be able to provide services to ELL students. *See* U.S. Dep't of Education, *Non-Regulatory Guidance, Supplemental Educational Services* 19-20 (2009), *available at* http://www.ed.gov/policy/elsec/guid/suppsvcsguid.pdf.

[18] Legislators' Br. 15.

1. NCLB's Provisions Exclude Large Numbers of ELL Students due to Grade Exclusion

NCLB's accountability provisions are focused on grades 3-8 and grades 10-12 – grades K, 1, 2, and 9 are not specifically considered.[19] For the 2007-2008 school year in Arizona, 88,524 ELL students were not considered because they are not within the grades specified for assessment under the NCLB. Collectively, these four grades accounted for approximately 50% of Arizona's ELL student population[20] and are not counted when it comes to the aforementioned parental options-generating provisions of NCLB.

In California, which educates almost one-third of all ELL students in the nation, students are tested for NCLB purposes in grades 2-8, and then again in grade 10.[21] In 2008, there were 584,977 ELL students in grades K, 1, 9, 11, and 12 in California left entirely

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[19] Under 20 U.S.C. § 6311, the test scores of students at grades 3-8 and (at least once) in grades 10-12 are counted to determine whether schools will be identified for improvement – the precondition for the triggering of the two parental options of student transfer and supplemental services.

[20] Arizona Department of Education, Personal Communication to Roger Rice, Re: 00-ADE Data Request (Feb. 2, 2009).

[21] California Dep't of Educ., *2008 Adequate Yearly Progress Report Information Guide*, 7 (Nov. 2008), *available at* http://www.cde.ca.gov/ta/ac/ay/documents/infoguide08r.pdf.

outside NCLB's accountability framework due to grade exclusion.[22]

The fact that most high schools do not receive Title I funds at all underscores NCLB's limitations in reaching all students for accountability purposes. Title I funds are used predominantly at the elementary level. In 2004-05, for example, 71 percent of elementary schools received Title I allocations, compared with 40 percent of middle schools and 27 percent of high schools. Students in grades 10 through 12 accounted for 21 percent of all public school students but constitute only 9 percent of Title I participants.[23] As a result, NCLB's "system" fails to address the progress of thousands of secondary students – including those who are in greatest danger of dropping out of school.[24]

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[22] Warren Institute, *Analysis of 2008 NCLB Accountability for ELL Students in California*, Table 5, *available at* http://www.law.berkeley.edu/3164.htm.

[23] U.S. Dep't of Education, *National Assessment of Title I Final Report*, xxi, 13 (2007). The accountability provisions of NCLB apply only to schools and districts that receive Title I funds. *See* 20 U.S.C. § 6311(b)(2)(A)(ii), limiting the requirements of § 6316 (which sets out the parental rights to transfer students and also to seek supplementary services) to Title I schools.

[24] According to the Arizona Department of Education, *Research and Evaluation Section* (Oct. 2008), the statewide dropout rate more than doubles between grade 8 and grade 9. A study of national data by researchers at Boston College found that: "the rate at which students disappear between grades 9

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2. When There are Fewer Than 40 Students in the ELL Group, Arizona ELL Students Are Excluded for Accountability Purposes

Under NCLB, student subgroups such as ELL students are not counted in AYP calculations when their number is too small. 20 U.S.C. § 6311(b)(2)(C)(v)(II). For instance, Arizona's specific minimum number, or "N" size, is 40 students[25] in any one subgroup (including ELLs), which was an increase from Arizona's prior "N" of 30.[26]

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and 10 has *tripled* over the last 30 years." Walt Haney et al., *The Education Pipeline in the United States, 1970-2000*, 10 (2004).

[25] *State of Arizona Consolidated State Application Accountability Workbook*, 45 (Revised July 3, 2008, Final Submission).

[26] Thirty students was conventionally considered large enough to provide statistically meaningful results, but Arizona received permission from the Department of Education to raise the minimum number to 40. Arizona Department of Education, *Arizona's School Accountability System Technical Manual,* Vol. II, 19 (2004) *available at* http://azed.gov/azlearns/NCLB_Technical_Manual_2003.pdf; *Decision Letter on Request to Amend Arizona Accountability Plan*, Letter, Henry L. Johnson to Tom Horne (Sept. 15, 2005), *available at* http://www.ed.gov/print/admins/lead/account/letters/acaz3.html. The Commission of No Child Left Behind, a bipartisan group charged with providing recommendations to improve NCLB, suggests "N" sizes of no larger than 20 students to ensure accountability for all students. Commission on No Child Left Behind, *Beyond NCLB: Fulfilling the Promise to Our Nation's Children* (Washington, D.C.: The Aspen Institute, 2007). *See also* Erin Dillon & Andrew J. Rotherham*, State's Evidence: What It Means to Make 'Adequate Yearly Progress' Under NCLB,* Education Sector (2007).

The test scores of students below a minimum group size in a given LEA are not evaluated or reported as a separate subgroup, but rather are grouped with all student scores in the LEA and therefore may be masked by the achievement of other students. As a result, only those schools or school districts with the largest ELL student populations are held accountable for their academic achievement under NCLB.[27]

As another example, California includes ELLs as a subgroup in its calculations only if there are 100 or more ELLs enrolled at the school or there are 50 or more ELLs and they make up at least 15 percent of the tested population.[28] Thus, there were nearly 95,000 ELLs in schools in California which did not need to satisfy AYP for ELLs because the ELL population was deemed not numerically significant.[29]

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[27] For example, a school with an "N" size of 30 "where 50 percent of the students in grades K-6 are [ELL] can nonetheless avoid having to have a [ELL] subgroup if there are only 29 [ELL] students in grades 3-6." Wayne E. Wright, Education Policy Study Laboratory, Language Policy Research Unit (LPRU), *Evolution of Federal Policy and Implications of No Child Left Behind for Language Minority Students* (Arizona State University) 42-43 (January 2005), *available at* http://epicpolicy.org/files/EPSL-0501-101-LPRU.pdf.

[28] Letter from U.S. Dep't of Educ. to California (Jan. 8, 2009), *available at* http://www.ed.gov/admins/lead/account/cornerstones/ca.pdf.

[29] Warren Institute, *Analysis of 2008 NCLB Accountability for ELL Students in California*, Table 3, *available at* http://www.law.berkeley.edu/3164.htm.

When ELLs in grades not counted for accountability are combined with those excluded due to lack of numerical significance, these two gaps in NCLB's accountability system left 679,521 ELLs in California – nearly half of all ELLs in the state, or one-sixth of all ELLs in the nation – beyond the reach of NCLB accountability mechanisms for ELLs. Even in the subset of California districts meeting NCLB accountability requirements with ELLs, there were 125,508 ELLs not covered by any ELL accountability mechanism by virtue either of grade exclusion or not meeting the state's numerical significance standard for subgroup accountability.[30]

This data demonstrates there are ELL students who attend schools or are in school districts in California that may have met AYP, but who, as a subgroup, may not be proficient under state standards and who may not be receiving appropriate language instruction.

In its Notice of Proposed Rulemaking issued in April 2008, the U.S. Department of Education stated that nearly 2 million students are not being counted in NCLB subgroup accountability determinations at the school level. Minority students are as much as seven times more likely than white students to have their scores excluded from school-level AYP subgroup calculations. 73 Fed. Reg. 22020, 22022 (Apr. 23, 2008).

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[30] *Id.*, Tables 1, 3, 5.

3. Arizona's Application of a 99% Confidence Level Further Excludes ELL Students for Accountability Purposes

In addition to the minimum group size, states use confidence intervals in calculating AYP. This plus or minus zone or "window" gives schools and school districts leeway in the number of students that need to be proficient to meet AYP for a given year. According to the Congressional Research Service ("CRS"):

> Use of this technique (also) tends to have the effect, whether intentional or not, of substantially reducing the number of schools or ELLs identified as failing to meet AYP standards. Use of this statistical technique is not explicitly authorized by the NCLB, but its inclusion in the accountability plans of several states has been approved by ED.[31]

Under this procedure, the higher the confidence interval the larger the zone must be and the fewer students will need to score proficient to meet the AMAOs or AYP.[32] In Arizona, AYP determinations are

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[31] Wayne C. Riddle, *CRS Report for Congress, Education for the Disadvantaged: Reauthorization Issues for ESEA Title I-A Under the No Child Left Behind Act*, 19 (2006).

[32] The Commission on No Child Left Behind recommends limiting confidence intervals to 95%. Commission on No Child Left Behind, *Beyond NCLB: Fulfilling the Promise to Our Nation's Children* (Washington, D.C.: The Aspen Institute, 2007). *Also see*, Erin Dillon and Andrew J. Rotherham, *States'*

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based on a 99% confidence level and the Arizona Department of Education determines the confidence interval for the percent proficient for each subject and grade.[33]

Utah, like Arizona, uses a 99% confidence interval. In Utah, the proficiency objective for Language Arts for grades 3-8 is 65% proficient, and for mathematics at least 57% proficient. For a group of 25 students, the 99% confidence level would have the effect of reducing the required number of proficient students under AMAO for math from 15 (57% of 25) to 8 proficient students.[34] The same critique applies to Arizona and other states as well.

Evidence: What It Means to Make 'Adequate Yearly Progress' Under NCLB, Education Sector (July 2007).

[33] *See* Arizona Department of Education, *Arizona's School Accountability System 2006, Technical Manual, Volume II: Adequate Yearly Progress,* DE 12 (2007).

[34] David Rogosa, *Statistical Misunderstandings of the Properties of School Scores and School Accountability,* in *Yearbook of the National Society for the Study of Education*, Vol. 104, 165-6 (2005). *See also* David Rogosa, *The NCLB "99% confidence" scam: Utah-style calculations,* Stanford University (November 2003) *available at* http://www-stat.stanford.edu/~rag/nclb/utahNCLB.pdf.

4. The Meaning of "Making Adequate Yearly Progress" Does not Necessarily Equate to Success for all ELL Students

The number of ELL students' scores potentially considered for accountability purposes under 20 U.S.C. §§ 6311 and 6316 is considerably diminished (1) after grades K-2 and 9 are excluded, (2) by not counting the ELL subgroup members where there are fewer than 40 in a cohort, and (3) by application of the confidence interval procedure. The remaining pool of ELLs for determining AYP is then measured against the annual progress as set by the State.[35]

Arizona's Annual Proficiency Goals for School Years 2005-2007							
Grade	**3**	**4**	**5**	**6**	**7**	**8**	**High School**
Math	43.3%	54%	33.3%	43%	48%	22.5%	25%
Reading	53.3%	45%	43.3%	45%	49%	42.5%	35.8%

[35] Petitioner Horne is incorrect in stating that: "NCLB also sets certain minimum targets so that specified percentages of . . . ELL students must . . . achieve success academically (AYP) on Arizona's AIMS tests." (Superintendent's Br. 18). As the State's witness testified at trial, it is the Arizona Department of Education that sets improvement percentages for ELL students, not NCLB. *See* Tr. Day 1, p. 160. *See also,* Ellen Forte Fast & William J. Erpenback, *Revisiting Statewide Educational Accountability Under NCLB, Council of Chief State School Officers*, 21 (2004) ("The Act leaves it to states to determine the level of performance that reflects adequate preparation or proficiency.").

As the table above demonstrates, schools in Arizona meet their annual proficiency standards under NCLB even when approximately between 50 and 75% of their students are *not* proficient in math or Reading.[36]

The low rate of annual proficiency set forth by Arizona for those ELL students actually subject to NCLB's provisions is further watered down for accountability purposes through application of additional devices, thus further distancing NCLB from the purposes of the EEOA. Under 20 U.S.C. § 6311(b)(I), if a sub-group such as ELL students does not meet the State's academic achievement objectives in any year, their school will still be considered to have met its annual progress standard if the percentage of those proficient increased by 10% from the preceding year. So, for example, if only 20% of ELLs meet the proficiency standards in any given year, a school will still meet its AYP requirement if only 22% of ELLs meet academic proficiency in the following year, an increase of 10%.

Furthermore, school districts can only be determined to need "improvement" if they fail to make AYP in the same subject for two consecutive years in both elementary/middle school and high school.[37] If high

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[36] *State of Arizona Consolidated State Application Accountability Workbook*, 31 (July 3, 2008).

[37] *See, Decision Letter on Request to Amend Arizona Accountability Plan*, *supra* at n.26. As one commentator has described the practice: "A district could fail two-thirds of its

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school ELLs fail to master math, for example, there is no district failure so long as elementary school students meet the math AYP criterion. Similarly, if elementary school ELLs fail to meet the State's academic objectives in Reading in year one, meet the objective in Reading in year two, but fail to meet the math objective, annual progress will be considered to have been met because the failure was not in the same subject for two consecutive years.

5. Not all School Districts with ELL Students Participate in Title III Funded Programs

All school districts are expected to serve their ELL students, but not all districts are eligible for Title III funding. Under 20 U.S.C. § 6824(b), a State education agency shall not award a sub-grant to a school district in an amount less than $10,000. States have discretion in determining how to implement this provision. In Massachusetts, for example, Title III funds are distributed to school districts enrolling 100 or more ELL students. In FY2007, this meant that 56 out of 251 school districts with ELL students

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students every year and never be held accountable, as long as it wasn't exactly the *same* two-thirds." Kevin Carey, *The Pangloss Index: How States Game the No Child Left Behind Act*, 10 (Nov. 2007), *available at* http://www.educationsector.org/usr_doc/The_Pangloss_Index.pdf.

were eligible for Title III allocations.[38] In New York State for the 2006-2007 school year, 271 school districts were eligible for Title III funding for their ELL students but 628 school districts with ELL students were not directly eligible.[39]

E. Many ELLs Who are Failing to Demonstrate Proficiency on State Assessments are in Districts and Schools Satisfying all the Accountability Requirements of NCLB

There are hundreds of thousands of ELL students failing to meet their state-mandated proficiency rates in school districts that are meeting all of NCLB's ELL accountability requirements. A research study in California found that a majority of ELL students (140,243) who attend school in California's NCLB-compliant districts did not score "proficient" on the English/Language Arts assessment.

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[38] Mass. Dept. of Elementary and Secondary Education, *No Child Left Behind Title III: Language Instruction for Limited English Proficient & Immigrant Students Program*, *available at* http://www.doe.mass.edu/ell/titleIII.html (last visited Mar. 23, 2009).

[39] New York State Education Department, *No Child Left Behind Allocations for Title III, Part A For New York State Public School Districts and Charter Schools* 2006-2007 (Dec. 5, 2006), *available at* http://www.emsc.nysed.gov/funding/cladcep/0607/titleIIIallocs0607rev8-9-06.htm.

School-level data reveals even more starkly the differences between meeting accountability requirements under NCLB and learning academic English. In California, among schools that made AYP in 2008, there were 209,012 ELLs – approximately 1 in 8 ELLs in the state – who were not proficient in ELA (58%) and 164,748 (46%) not proficient in math.[40] *Amici* do not suggest that failing to achieve proficiency *per se* constitutes an EEOA violation when states and districts are otherwise taking appropriate action under the EEOA. Rather, as the data suggest, even ELLs in districts and schools meeting NCLB accountability properly retain the right to question whether their educational agencies are taking appropriate action as to them.

III. Petitioners' Interpretation of the EEOA Would Embroil the Court in Oversight of NCLB

The history of cases involving Section 1703(f) of the EEOA show that courts have been able to balance the requirement that states and local school districts take "appropriate action to overcome language barriers" with deference to the role of local government in educational policy setting. In urging that this standard now

[40] Warren Institute, *Analysis of 2008 NCLB Accountability for ELL Students in California*, Tables 2, 4, *available at* http://www.law.berkeley.edu/3164.htm. Nearly 18% of ELLs in these "successful" schools were not counted as part of an ELL subgroup. *Id.*, Table 3.

be merged with NCLB, Petitioners are inviting an expansive new realm of judicial involvement in public education.

If the measure of "appropriate action" under the EEOA is to be gauged by whether a state or school district is "in compliance" with NCLB, inevitably the question will turn to how "compliance" is to be determined. That, in turn, raises the question whether the U.S. Department of Education's multiple interpretations and exceptions in the administration of NCLB are themselves "appropriate actions" faithful to the EEOA statute. Academic commentators who have carefully tracked how NCLB has been implemented have noted that: "what once seemed a clear if highly controversial policy has now become a set of bargains and treaties with various states."[41] Put another way, the facile notion of "compliance with NCLB" can mean different things in different states.

For example, Arizona has increased its "N" size and confidence intervals under NCLB, as well as loosened its definition of school districts requiring improvement, identifying only those districts when they did not make AYP in the same subject in both elementary/middle and high school grade spans for two consecutive years. The implications of these

[41] Gail L. Sunderman, *The Unraveling of No Child Left Behind: How Negotiated Changes Transform The Law*, The Civil Rights Project, Harvard University 6 (February 2006). As a result "accountability no longer has a common meaning across states or even within states." *Id.* at 10.

changes are profound and, whatever their intent, serve to reduce the number of students counted and schools identifiable for "accountability" purposes.[42]

Amici are not taking a position as to whether these particular revisions and amendments are appropriate or consistent with Congress' intent or the language of NCLB. Rather, *amici* point them out to indicate that whatever surface appeal conflating the EEOA with NCLB may have, the path implies much more, rather than much less, judicial oversight.

[42] *Decision Letter on Request to Amend Arizona Accountability Plan*, *supra* at n.26. *See* other Arizona letters requesting amendments in 2004, *available at* http://www.ed.gov/print/admins/lead/account/letters/acaz2.html, and http://www.ed.gov/print/admins/lead/account/letters/acaz4.html, (2006), http://www.ed.gov/print/admins/lead/account/letters/acaz5.html (2007), and http://www.ed.gov/print/admins/lead/account.letters/acaz6.html (2008).

CONCLUSION

For the above reasons, *amici* respectfully ask that the Court affirm the decision below.

Respectfully submitted,

NINA PERALES
Counsel of Record
DAVID G. HINOJOSA
MEXICAN AMERICAN
LEGAL DEFENSE AND
EDUCATIONAL FUND
110 Broadway St., Suite 300
San Antonio, TX 78205
(210) 224-5476

CESAR A. PERALES
JOSE PEREZ
DIANA SEN
LATINOJUSTICE PRLDEF
99 Hudson Street, 14th Floor
New York, NY 10013
(212) 219-3360

JOHN T. AFFELDT
TARA KINI
PUBLIC ADVOCATES, INC.
131 Steuart Street, Suite 300
San Francisco, CA 94105
(415) 431-7430

ROGER L. RICE
JANE E. LÓPEZ
MULTICULTURAL EDUCATION,
TRAINING & ADVOCACY,
(META Inc.)
240A Elm St., Suite 22
Somerville, MA 02144
(617) 628-2226

DANIEL R. ALONSO
STEWART WALLACE
MICHAEL DENVIR
KAYE SCHOLER LLP
425 Park Avenue
New York, NY 10022
(212) 836-8000

Attorneys for Amici

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STATEMENT OF INTERESTS

The Earl Warren Institute on Race, Ethnicity & Diversity

The Earl Warren Institute on Race, Ethnicity & Diversity (Warren Institute) at the University of California, Berkeley is a national, multidisciplinary research, policy analysis and public education venture that engages challenging topics in civil rights, equal opportunity, race and ethnicity in America to provide valuable intellectual capital to public and private sector leaders, the media and the general public, while advancing scholarly understanding. Central to its methods are concerted efforts to build bridges connecting the world of research with the world of civic action and policy debate so that each informs the other, while preserving the independence, quality and credibility of the academic enterprise. The Warren Institute devotes significant attention to education issues, including promoting college-ready K-12 education for all, increasing access to quality education for immigrant children, improving system performance, and promoting institutional accountability for student success.

Education Law Center

Education Law Center (ELC) is a non-profit organization in Newark, New Jersey established in 1973 to advocate on behalf of public school children for access to an equal and quality education under state and federal laws. ELC represents the plaintiff school children in the *Abbott v. Burke* litigation and

continues to advocate on their behalf to ensure effective and timely implementation of the educational programs and reforms ordered by the New Jersey Supreme Court. Because of its nationwide expertise in school finance, preschool, facilities, and other areas of education law and policy, ELC established EducationJustice, a national program, to advance equitable educational opportunity and narrow achievement gaps. EducationJustice and ELC work to improve opportunities for low-income students, students learning English, and students with disabilities through policy initiatives, research, public education, and legal action, in states across the nation. EducationJustice has participated as *amicus curiae* in quality education cases in the state courts of Colorado, Connecticut, Indiana, Missouri, Oregon, and South Carolina.

LatinoJustice PRLDEF

LatinoJustice PRLDEF (formerly known as the Puerto Rican Legal Defense and Education Fund) was founded in New York City in 1972. Our continuing mission is to protect the civil rights of all Latinos and to promote justice for the pan-Latino community. Since our founding 36 years ago, we have become a major national civil rights organization litigating impact cases, primarily across the Eastern United States. In our first lawsuit, *Aspira v. New York City Board of Education*, we helped establish bilingual education in New York. We have combated the forced segregation of Latino children in Delaware, Connecticut and Massachusetts. In addition to creating pathways

for success for Spanish-speaking children in public schools, we have fought discriminatory hiring policies for civil service jobs, provided equal access to public housing for Latinos, secured the provision of public services in Spanish, and protected the constitutional rights of migrant workers. LatinoJustice PRLDEF has argued landmark civil rights cases that have had profound implications for all Latinos.

Mexican American Legal Defense and Educational Fund (MALDEF)

MALDEF is a national nonprofit organization established in 1968 to protect the civil rights of Latinos living in the United States. MALDEF secures the civil rights of Latinos through litigation, advocacy and education. MALDEF has represented Latino interests in many important language rights and other educational rights cases in Texas, California, Colorado, New Mexico, Arizona and other states, including the landmark case, *Plyler v. Doe*. MALDEF's mission includes a commitment to pursuing equal educational opportunities for Latino students, including the opportunity to become academically proficient in English and participate in parity with other students in educational programs, and therefore MALDEF has a strong interest in the outcome of this case.

Multicultural Education, Training & Advocacy, (META) Inc.,

Multicultural Education, Training & Advocacy, (META) Inc., is a national nonprofit organization formed in 1983 for the exclusive purpose of protecting the rights of language minority and poor children to equal educational opportunities in schools across the nation. META has pursued litigation, policy analysis, and community education, on behalf of such children in Massachusetts, New York, Florida, Texas, Colorado, California, New Mexico, and elsewhere. META knows firsthand what it means for these vulnerable student populations to go without appropriate education including the lack of trained teachers, curricula, and materials that are part of appropriate or equal education for any child. META is filing this brief because of the dangerous arguments advanced by Petitioners' case that seek to undo decades of sensible civil rights litigation in favor of reliance on an overstated and misunderstood federal funding statute that in no way allows the parents of English language learner students to protect their children's rights or future.

Public Advocates, Inc.

Public Advocates, Inc. is a non-profit, public interest law firm and one of the oldest public interest law firms in the nation. Public Advocates uses diverse litigation and non-litigative strategies to handle exclusively policy and impact cases that challenge the

persistent, underlying causes and effects of poverty and discrimination. Since its founding in 1971, a major focus of Public Advocates' work has been advocacy to advance equal educational opportunities for low-income students, students of color, and English Learners. Public Advocates was one of the lead counsel in *Williams v. State of California*, a statewide class action lawsuit challenging the state's failure to provide all students with basic educational resources: qualified teachers, textbooks, and decent school facilities. The *Williams* Settlement established, *inter alia*, robust systems for monitoring and enforcing EL students' rights to qualified teachers with specialized training in how to teach them and adequate instructional materials.